United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2194

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IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

In The Matter of

ARBOR HOMES, INC.,
Bankrupt.

ALLAN RUBIN HOMES, INC., ALLAN RUBIN HOMES MILFORD, INC., and ALLAN RUBIN HOMES CLINTON, INC.
Claimants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
for the DISTRICT OF CONNECTICUT

BRIEF OF CLAIMANTS-APPELLANTS WITH APPENDIX

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STATEMENT OF THE ISSUE

Did the District Court err in denying the Claimants' Petition For Review, and confirming the order of the Bankruptcy Court in which the Bankruptcy Court found the Claimants to be indebted to the Trustee for goods sold and delivered?

STATEMENT OF THE CASE

This action is based upon a claim filed by a dealer in pre-cut houses (Rubin) against its supplier (Arbor) for breach of a contract to supply houses. The dealer and supplier had had a business relationship lasting from 1962, when they executed a dealership agreement (Exhibit A) until the supplier filed a petition under Chapter XI of the Bankruptcy Act on August 16, 1971.

For some months prior to the filing of the Chapter XI petition, the claimant had been experiencing shortages in the pre-cut home "packages". These shortages became increasingly severe until one week before the filing, an officer of the supplier notified the dealer that houses that had been ordered were not scheduled for delivery. Upon receiving notice that the petition had been filed, the dealer (appellant herein) gave the supplier written notice that it would order no more houses, and that their relationship was at an end.

On February 11, 1972, the appellant filed a proof of claim, and thereafter, the debtor filed a counter-claim. The debtor was adjudicated on May 20, 1972. Thereafter, the parties were heard before the Bankruptcy Court in accordance with two stipulations, Appendix p. 29a-35a, in which the Bankruptcy Court found for the trustee (appellee herein), Appendix, p. 22a (Seidman, J.).

The appellant then filed a petition for review to the District Court for the District of Connecticut on January 8, 1974, wherein the order of the Bankruptcy Judge was confirmed (Clarie, J.) on September 3, 1974.

SUMMARY OF ARGUMENT

It is the contention of the appellant that the District Court erred in confirming the order of the Bankruptcy Court

because the facts in the record do not support a finding by the Bankruptcy Court that there was a unilateral termination of the contract (Exhibit A) by Rubin, Ruling On Petition for Review, Appendix p. 26a-28a. The Ruling on Petition for Review further denied the Petition for the same reasons as those included in the Memorandum of the Bankruptcy Court Appendix, p. 4a-21a. The appellant contends those reasons were in error, and by adopting these reasons the District Court erred. Accordingly, resort must be had to the order of the Bankruptcy Court setting forth the reasons for its decision, Appendix, p. 4a-21a.

ARGUMENT

I.

The District Court erred in confirming the finding of the Bankruptcy Court that Rubin was unjustified in terminating the dealership agreement (Exhibit A).

The Memorandum and order of the Bankruptcy Judge, Appendix, p. 12a specifically stated, "There had been multiple violations of various requirements of performance by Arbor, and the prospect of its being able to continue to perform under the terms of the Agreement was getting dimmer as with the passage of time." "Rubin was in a difficult business situation. Its sole supplier had reached a point where it could not perform adequately to supply its needs, and Rubin properly took whatever steps its business judgment indicated were necessary."

The Memorandum and order further states that, on the date of filing the Petition, "there is no evidence that Arbor intended not to continue its operations, or, in fact, to discontinue its relationship with Rubin." Appendix, p. 14a.

Whether or not Arbor wished to continue its business with Rubin is immaterial. The evidence was conclusive that

Arbor was simply unable to continue. At the time of the filing of the Petition, Arbor could not supply Rubin with the houses it required (Transcript, July 14, 1972, p. 9 and 10). Shortly after the filing of the Petition, the plant itself closed down (Transcript, April 25, 1972, p. 102).

Further, the fact of inability to perform was adequately and properly communicated to Rubin by officers of Arbor (Exhibit D) (Transcript, April 26, 1972, p. 14, 16).

By notifying Arbor that the dealership agreement was at an end, (Exhibit 8), Rubin was merely accepting the repudiation already communicated by Arbor to Rubin. *Wonalancet Co.* v. *Banfield,* 116 Conn. 582, 586; 165 Atl. 785; 7 Am. Jur. 2d, *Contracts,* Sec. 450, 451. "If a partial non-performance of a contract is accompanied by a repudiation, the repudiator is deemed to have committed a total breach." *Sagamore Corporation* v. *Willcutt,* 120 Conn. 315, 320; 180 Atl. 464, 437; 17 Am. Jur. 2d, *Contracts,* Sec. 443.

According to its terms, the dealership agreement (Exhibit A) was a "requirements" contract. Sec. 42a-2-306, Conn. General Statutes Anno. The Seller has the obligation to "use best efforts to supply the goods." It would seem basic to dealings under the law merchant that when a supplier is disabled from performing, it should, in good faith, deal with the other buyer so as to minimize the buyer's exposure to loss.

In summary, on the evidence before the Bankruptcy Court, which was reviewed by the District Court, and formed the basis of its Ruling, the only conclusion that could be drawn was that prior to the filing of the Chapter XI petition, there had been a breach and a repudiation. This was properly accepted by Rubin (Exhibit 8) and the contract was terminated.

II.

The District Court erred in confirming the finding of the Bankruptcy Court that Rubin was obligated to seek arbitration as a condition precedent to claiming damages for breach of the dealership agreement (Exhibit A)

The dealership agreement (Exhibit A) contained provisions (Paragraphs 11 and 12), relating to arbitration. The Bankruptcy Court found that failure to pursue these provisions barred the claimant-appellant from proving its damages in the Bankruptcy Court.

At the trial of the proof of claim, the claimant-appellant made the following claims:

a. that the arbitration procedures related to claims for violation of territory, improper materials, etc.;

b. that the arbitration procedure did not apply to a total breach;

c. that the arbitration provisions were waived by the parties;

d. that the order of the Bankruptcy Court concerning the debtor in possession restrained the claimant from seeking arbitration.

Notwithstanding these claims, the Bankruptcy Court held the claimant was barred from proving damages for breach of contract by failure to seek arbitration.

a. The arbitration clauses were designed to protect against accidental violations of such matters as territory, workmanship, materials, and the like.

In this respect, the provisions were similar to those set forth in the case of *Pisciotta* v. *Newspaper Enterprises, Inc.*, 181 N.Y.S. 2d 113; 15 Misc. 2d 354 (1958).

b. The arbitration clauses were not intended to apply in cases of total breach.

A party is under no obligation to arbitrate any matter other than as provided in the agreement.

Frager v. *Pennsylvania General Insurance Company*, 155 Conn. 270; 231 Atl. 2d 531.

Paragraph 12 of said agreement refers to a time period for "curing" violations. The practice of using poor materials can be "cured". A total breach cannot be "cured."

c. The arbitration provisions were waived by the parties.

"Waiver is the conscious relinquishment of a known right." (Words and Phrases, Permanent Edition).

"Any conduct of the parties inconsistent with the notion that they treated the arbitration clause as in effect, or any conduct which might be reasonably construed as showing that they did not intend to avail themselves of such provisions may amount to a waiver thereof and estop the party charged with such conduct from claiming its benefits". *Independent School District* v. *A. Hedenberg and Company*, 214 Minn. 82; 7 N.W. 2d, 511; 5 Am. Jur. 2d, *Arbitration and Award*, Sec. 51 p. 557; 161 ALR 1426.

During the life of the dealership agreement, the arbitration procedure was never invoked, Appendix, Memorandum and order, p. 19a.

Further, Arbor, after the filing of the Petition, brought suit (Exhibit 9) against Rubin. This act is a basis for waiver. 5 Am. Jur. 2d, *Arbitration and Award*, Sec. 51.

Nor did Arbor, as debtor in possession, seek arbitration at any point although expressly authorized under Section 26 of the Bankruptcy Act.

d. The claimant was restrained by the Bankruptcy Court from invoking the arbitration procedure.

Exhibit 10 is the general restraining order relating to the debtor in possession.

Such an injunction relates to arbitration proceedings. *Waterbury Blank Book Manufacturing Co.* v. *Hurlburt*, 73 Conn. 715, 717; 49 Atl 196, 198.

Again, from the point of view of waiver, it should be noted that Arbor, by filing a Chapter XI petition, sought and obtained the restraining order.

Accordingly, it was error for the District Court to affirm the decision of the Bankruptcy Court that Rubin was barred from proving its damages for failure to seek arbitration.

CONCLUSION

The Ruling on Petition for Review should be reversed.

Respectfully submitted,

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Dated December 14, 1974